

Internal Revenue Service
memorandum

CC:TL-N-3598-88

Br4:CRGilbert

date: **APR 19 1988**

to: District Counsel, Washington, D.C. CC:WAS
Attn: W.A. Baker

from: Director, Tax Litigation Division CC:TL

subject: Delinquent Employment Tax Returns

This is in reply to your memorandum dated February 17, 1988, in which you requested technical advice regarding whether the above-entitled entity, a Congressional legislative service organization (LSO), is, or can be deemed to be, an instrumentality of the United States. The question arises in the context of an underpayment of employment taxes. While the taxes are not in issue, liability for any penalties and interest is in issue since Policy Statement P-2-4 states "Penalties and interest will not be asserted against agencies or instrumentalities of the United States." We have coordinated with the Individual Tax Division in formulating our response.

ISSUE

Whether the taxpayer, an LSO, is the type of entity contemplated by Policy Statement P-2-4.

FACTS

The taxpayer represents that it is a bipartisan LSO ^{1/} that filed delinquent employment tax returns, Forms 940 and 941, for the period [REDACTED] through [REDACTED]. The taxpayer requests abatement of interest and penalties assessed in connection with its employment tax liability on the basis that an LSO is the functional equivalent of a United States instrumentality and, thus, pursuant to Policy Statement P-2-4,

^{1/} The Congressional Yellow Book, Winter 1987-88, lists the taxpayer as an LSO. See the attached photocopies.

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not subject to interest or penalties. The taxpayer further represents that it was formed in [REDACTED] by members of the House of Representatives to analyze issues of interest to northeastern and midwestern states. The House of Representatives Committee on House Administration, which oversees expenditures by House members, sets the rules for LSO's.

The regulations/resolution adopted by the House of Representatives Committee on House Administration on October 21, 1981, define an LSO as:

" . . . any congressional caucus, committee, coalition or similar group which -

(a) consists solely of Members of the House or Members of the House and Senate;

(b) is operated solely to provide legislative services or other assistance to the Members thereof in the performance of their official duties;

(c) receives support from Members of Congress via their allowances, or from the House itself in the form of office space, furniture, furnishings, telephone services, etc.;

(d) receives no income or contributions, either in cash or in kind, from any source other than the Congress or its Members, except as noted in paragraphs 3 [regarding educational intern, fellowship or volunteer programs which are primarily of educational benefit to the participants] and 8 [distribution to Members of Congress of reports, analysis or other research material prepared in whole or in part by persons other than persons employed by the Legislative Service Organization];

(e) is neither incorporated nor holds a separate tax-exempt status under the Internal Revenue Code;

(f) is sponsored by 30 Members of the House or two-thirds of the organization's total membership, whichever is less, who shall attest, in a statement with the Committee on

House Administration at establishment and by May 1 of each even-numbered year thereafter, that the organization is to provide bona fide legislative services or assistance which supports them in the performance of their official duties."

DISCUSSION

Policy Statement P-2-4 (approved November 6, 1981) was issued in response to the Comptroller General's Decision, B-161457 (May 9, 1978), which held that federal agencies may not use their appropriations for payment of interest and penalties. Although the Decision focused only on whether payments could be made from funds appropriated for federal agencies/instrumentalities, the Policy Statement focuses on federal agency/instrumentality status rather than an entity's source of funds. It appears from the Policy Statement's background file that a blanket exception was provided because of the perceived difficulties in collecting penalties and interest from any federal agency/instrumentality.

The Tax Court in Donaldson v. Commissioner, 51 T.C. 830, 837 (1969), based its decision on whether an entity was a federal agency/instrumentality, for purposes of an I.R.C. § 911 exclusion, on the relationship of the entity to the Government. The court, citing Frank E. Raffensperger, 33 T.C. 1097 (1960) and Standard Oil v. Johnson, 316 U.S. 481, 485 (1942), found the following factors to be persuasive: (1) the statutory authority for the entity's organization; (2) the regulations under which the entity is operated; (3) the fiscal control to which the entity is subjected; and (4) the character, i.e. governmental or commercial, of the entity's functions. 2/

The entity involved in Donaldson was the American Embassy Cooperative Commissary in Pakistan. The Tax Court concluded that the commissary was a United States agency since: (1) the commissary had no commercial objective; (2) the Ambassador could order the commissary's dissolution at any time and, upon dissolution, its assets could be distributed only with the approval of the Ambassador; and, (3) policy, as well as management direction, was vested in the Ambassador, his staff, and the staffs of the various missions in Pakistan.

2/ The Service cited Donaldson in Rev. Rul. 80-78, 1980-1 C.B. 171, and has thus apparently accepted the factors set forth in the case. In regard to another issue, Rev. Rul. 80-78 was modified by Rev. Rul. 80-167, 1980-1 C.B. 176, and clarified by Rev. Rul. 85-29, 1985-1 C.B. 223.

We believe that the factors used by the court in Donaldson to test an entity's relationship to the Government are also appropriate for determining whether the instant taxpayer is an instrumentality of the United States for purposes of Policy Statement P-2-4. Applying the Donaldson factors to the LSO's generally, we find:

(1) The facts are silent as the statutory basis for the establishment of LSO's. However, LSO's are defined under the regulations/resolution adopted by the House of Representatives Committee on House Administration and that committee sets the rules for LSO's;

(2) As defined under the regulations/resolution, an LSO is any congressional caucus, committee, coalition or similar group which consists solely of members of the House or members of the House and Senate which operates solely to provide legislative services or other assistance to its members in the performance of their duties;

(3) In general, an LSO receives financial support only from its members (via their allowances) or directly from Congress in the form of office space, furniture, furnishings, etc. The expenditures by House members are monitored by the Committee on House Administration.


(4) As already noted in (2) above, the sole purpose of an LSO is to provide legislative services and other assistance to its members in the performance of their official duties.

These factors seem to strongly suggest that the taxpayer as an LSO is an instrumentality of the United States, especially since the taxpayer represents that its function has been and is solely governmental and that Congress, through the House of Representatives Committee on House Administration, has continually controlled its finances and management. The materials which were included with your request for technical advice are insufficient for us to come to a definite conclusion, however. Conversations with Mr. Baker of your office reveal that additional information may not be readily available. Thus, a supplemental examination by the Service may be necessary as it appears that the underlying administrative file has not been located. We suggest that you

closely coordinate further efforts in this regard, taking into account the discussion herein, inasmuch as the matter may not warrant excessive Service involvement.

If you have any question regarding this matter, please contact Craig R. Gilbert at FTS 566-3305.

MARLENE GROSS
Director

By: 
HENRY G. SALAMY
Chief, Branch No.4
Tax Litigation Division

Attachment:
Congressional Yellow Book